IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.1722 OF 1993

1. Kalyan Citizens' Education
   Society, Kalyan Murbad Road,
   Kalyan-421 304,
   District: Thane.

2. Birla College of Arts,
   Science & Commerce, Murbad
   Road, Kalyan-421 304,
   District: Thane. .... Petitioners

- Versus -

Smt. Pushpavati wife of
Shrikrishna Wakode,
c/o Shri S.M. Vakoda,
Sarita Sadan Co-operative
Housing Society Limited,
Near Pandit Poultry Farm,
Ganesh Nagar, Tisgaon,
Kalyan (East) 421 301,
District: Thane. .... Respondent

Sarvasri Rahul Nerlekar i/b N.M. Nerlekar
for the Petitioners.

Shri M.P. Vashi for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: NOVEMBER 07, 2006

ORAL JUDGMENT:

1. Heard. The petitioners challenge the order dated 22-10-1992 passed in Appeal No.28 of 1991 by the College Tribunal. By the impugned order, the College Tribunal has set aside the order of termination of service of the respondent which was passed by the petitioners and further the petitioners have been directed to reinstate

the respondent with full back wages and consequential benefits.

2. Few facts relevant for the decision are that the respondent herein was appointed as a Lecturer on probation for a period of 24 months with effect from 17-7-1990 and the communication to that effect was issued to the respondent by the Chairman of the petitioner-management on 16-7-1990. The respondent's services came to be terminated with effect from 21-4-1991 by issuing an order-cum-notice dated 14-3-1991. The respondent preferred an appeal against the said order of termination which came to be allowed by the impugned order.

3. The impugned order is sought to be challenged on the ground that the same is contrary to the materials on record as well as to the provisions of law and, therefore, is unsustainable. While assailing the impugned order, the learned Advocate for the petitioner submitted that the Tribunal totally ignored the documents on record which would show due compliance of the Statute No.418(2) of the Bombay University Statutes. He, therefore, submitted that the records disclose that the decision to terminate the services was taken by the Governing Body and it was communicated to the respondent under the signatures of the Chairman of the Governing

Body and that of the Principal and, therefore, there was no scope to find fault with the decision regarding the termination of services of the respondent. He further submitted that the Tribunal failed to appreciate that the termination letter was delivered to the respondent on 19-3-1991 and therefore it became effective from the said day and hence no importance could have been given by the Tribunal to the date of 14-3-1991 recorded in the letter of communication. Drawing attention to the Statute No.418(2) and the copy of the performance report which was placed before the College Tribunal, submitted that the same was undisputedly in terms of Appendix D-1 to the Statutes and therefore it was not a self-assessment report but it was a report by the Principal in accordance with the said Statute and same having been totally overlooked by the Tribunal, the finding on the point of absence of such report is totally contrary to the materials on record and hence perverse.

4. On the other hand, it is the case of the respondent that the order of termination, though issued during the probation period, it is not an innocuous order in as much as that it was issued on account of alleged misconduct of late reporting to the duties on the part of the respondent and, therefore, before terminating the services on the said ground, it was necessary for the

management to serve the chargesheet and to hold inquiry and only thereafter to take an appropriate decision on the basis of the report of the inquiry officer. No such procedure has been followed and therefore the said order is clearly in violation of the requirement of law and in that connection, attention is drawn to the decision of the Apex Court in **Jarnail Singh and others, etc. v. State of Punjab and others,** reported in AIR 1986 SC 1626. It is further case of the respondent that there has ben absolutely no explanation submitted by the petitioners to the specific contention which was raised by the respondent that the order of termination was issued by the Principal and the Chairman without any support of resolution by the management of the institution. Once it is not in dispute that the termination can be only on necessary resolution to that effect by the Governing Body, and the order of termination discloses to have been issued on 14-3-1991 whereas the alleged resolution is of 15-3-1991, the learned Advocate for the respondent submitted that it discloses that the order of termination was without authority and therefore it lacked the legal sanctity and hence the Tribunal was justified in setting aside the same. In that connection, reliance is sought to be placed in the decision of the Division Bench of this Court in the matter of **M.I. Masih v. Peoples' Welfare Society and others,** reported in 1982 Mh.L.J. 271. It

was further contention on behalf of the respondent that though the order of termination on the face of it appears to be innocuous, the records disclose that the same was by way of punishment. Undisputedly there was grievance about the late reporting to the duties which, if established, would have proved to be a serious misconduct and considering the same, it was necessary for the petitioners to hold appropriate inquiry before passing the order of termination of the services. Having failed to comply with the said legal requirement, the Tribunal has rightly set aside the said order. It was also sought to be argued on behalf of the respondent that the matter having come before this Court in writ jurisdiction under Article 227 of the Constitution of India, and the respondent being a Scheduled Caste candidate appointed in a vacancy reserved for the Scheduled Caste candidate, and as the impugned order tends to meet the requirement of social justice, it would not be appropriate to interfere in such order in exercise of writ jurisdiction under Article 227. Merely because the decision is alleged to be a wrong decision, it could not be a case for interference under Article 227. It was also pointed out that nothing is placed on record to show that the action on the part of the Principal and the Chairman was ratified by the Governing Body.

5. It is not in dispute that the respondent was appointed on probation for a period of 24 months with effect from 17-7-1990 is not in dispute. The service conditions of the respondent are governed by the provisions of the Bombay University Act, 1974, hereinafter called as "the said Act" and the Statutes framed thereunder. The services of the respondent were sought to be terminated with effect from 21-4-1991. The order and the one month's notice in that regard was issued under the letter dated 14-3-1991. However, the same was served upon the respondent on 19-3-1991. The said letter was issued under the signature of the Chairman of the Governing Body and the Principal of the institution. The said letter discloses that the services of the respondent were sought to be terminated on the ground that her performance was not satisfactory.

6. It is settled law that when an employee on probation does not render the services to the satisfaction of the employer, his services can be terminated by issuing necessary notice in advance in terms of the service conditions or on payment of salary in lieu of such notice for the required period. Considering the said settled provision in law, and on plain reading of the order of termination, no fault can be found with it in view of the fact that the respondent was on probation and would have continued to be so, but for terimination,

till 21-4-1991. The contention on behalf of the respondent however is that though the order of termination appears to be innocuous, it was, in fact, issued by way of punishment on the ground that the respondent used to report late to the duties which, if proved, would constitute a serious misconduct and in that respect attention is drawn to the decision of the Apex Court in **Jarnail Singh's** case (supra).

7. The Apex Court in Jarnail Singh's case had held that:

> "when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such a case, will lift the veil and will see whether the order was made on the ground of misconduct/inefficiency or not."

Undoubtedly, therefore, it cannot be disputed that when the employee assails the order of termination to have

been issued on the basis of misconduct, though the order is couched in innocuous terms, it would be incumbent on the Court to ascertain from the records placed before it the real circumstances which could be the basis and the foundation for the order complained of.

8. In the case in hand, the grievance of the respondent is that the order of termination is based on the alleged misconduct of late reporting to the duties. The petitioners, on the other hand, have submitted that the order of termination was based on the resolution of the Governing Body dated 15-3-1991. As regards the contention of the respondent that the said resolution is not the basis for the order of termination of her services, before dealing with the said contention, it would be appropriate first to deal with the point as to whether the order of termination is on the ground of misconduct relating to late reporting to the duties. In that regard, it would be necessary to consider all the materials which are placed on record in justification of the order of termination.

9. Undisputedly, the petitioners are relying solely on the resolution dated 15-3-1991 by way of justification for the order of termination. The said resolution on this aspect reads thus:

> "Principal informed the members that he has received a confidential report of Mrs. Wakode P.S. (Miss. Tayade P.H.) from the Head of the Department of Commerce that her performance is not satisfactory. During the academic year, she was asked to improve her performance, but she has failed to improve her performance. Hence her services may please be terminated. Members discussed the point and were of the opinion that if her services are not satisfactory, then her services be terminated and accordingly, the following resolution was passed:
>
> "R E S O L U T I O N"
>
> It is resolved that the services of Mrs. Wakode P.S. (Miss. Tayade P.H.) a lecturer in Commerce, whose performance was found absolutely unsatisfactory, be terminated from the College with effect from 21.4.1991."

Plain reading of the above quoted resolution evidently discloses that the ground for termination is the

unsatisfactory service by the respondent. It nowhere refers to any misconduct on the part of the respondent. Being so, as far as the material which could be said to be relied upon by the Governing Body to arrive at the decision for termination of the services of the respondent, it cannot be said that the same is on account of any misconduct on her part, including the alleged misconduct of late reporting to the duties.

10. Undoubtedly, there are other materials placed on record which are said to have been brought to the notice of the Tribunal in the course of hearing of the appeal which reveal various observations by the school authorities regarding late coming and unsatisfactory services as well as dissatisfaction of the students abuot the teaching method by the respondent, etc. However, those documents cannot be considered while dealing with the decision regarding termination of services as the same were not refered to by the Governing Body while passing the said resolution. The resolution, however, does refer to the confidential report received from the Head of the Department of Commerce about the performance of the respondent.

11. The Statute 418(2) provides that:

"The Principal of the College shall

> maintain assessment report of a teacher on probation in the form prescribed for the purpose by the University, as shown in Appendix 'D-1' for every six months and complete it at the end of each term of the academic year. The Principal shall send to the Chairman of the Governing Body, at least two months before the date of expiry of the period of probation, his assessment report with a definite recommendation. If a teacher is not to be confirmed at the end of the probationary period a confidential report justifying the recommendation should be attached and such cases be referred to the Chairman of the Governing Body for further action. The Governing Body shall be the deciding authority in such cases."

Undoubtedly therefore, the report submitted by the Principal in the form of Appendix D-1 has to be considered by the Governing Body before arriving at the decision on the confirmation or termination of services of a probationer. The copy of the Appendix D-1, which is the report of the Principal, refers to various matters. It refers to the subject of attendance -

regularity and punctuality, student-teacher relationship, colleague relationship, class control and other matters including reading habits. In the case of the respondent, the information submitted regarding the attendance was to the effect that "Irregular, remains absent without information. Applies for leave only after reminder.". As regards the class control, the report was to the effect that "No control. She has to improve. This is possible through better preparation.". Further, the information regarding the reading habits and other matters, the report reads thus:

> "Nothing beyond one or two Text-books. She has to read periodicals and newspapers, to quote latest examples to the students. She should give notes in her own language. Text material need not be produced. She is very poor in English. There are complaints about Teaching, attendance of the students is not satisfactory in her lectures. This was brought to her notice."

Apparently, the report not only discloses about the performance of the respondent as a teacher but also refers to irregularity in attendance and remaining absent without intimation as well as applying for leave

after having been reminded about the same. Certainly these aspects would relate to misconduct, if established. However, it is pertinent to note that the resolution by the Governing Body nowhere refers to these aspects of the report. It merely refers to the performance part. Being so, in spite of the fact that the report submitted to the Governing Body did refer to the alleged misconduct, the decision nowhere discloses to have been influenced by the said part of the report. On the contrary, the decision specifically refers to the performance aspect of the respondent as a teacher. Hence the contentions which are sought to be raised regarding the decision of termination that though the order is innocuous, in fact it is on the ground of alleged misconduct, cannot be accepted.

12. It is pertinent to note that in Jarnail Singh's case the Apex Court was dealing with a matter wherein the authority had terminated the services of the petitioners therein on the ground that the posts in which they were required to be appointed were no more required, while at the same time they had retained and regularised the services of the ad hoc employees as well as the ad hoc Surveyors who were recruited later in time in the said post of Surveyors to the prejudice of the rights of the petitioners before the Apex Court. That is not the case in the matter in hand.

13. Once the order of termination issued against an employee on probation nowhere discloses any stigma to have been attached to the employee and unless the employee is able to make out a case of the action being either mala fide or by way of punishment, on account of misconduct as such, the order will have to be held as an innocuous order. It would be a discharge simpliciter as was held by the Apex Court in **Municipal Committee, Sirsa v. Munshi Ram,** reported in 2005 AIR SCW 762.

14. As regards the contention of the petitioners that the order is contrary to the materials on record in as

much as that the Tribunal failed to appreciate that the order was communicated on 19-3-1991 and therefore it took effect from that day, much after the resolution of 15-3-1991 and therefore no grievance could have been made for having the letter being dated as 14-3-1991. Undisputedly, the records apparently disclose that the letter was dated 14-3-1991 and it was signed by the Principal and the Chairman. The letter on the face of it nowhere refers to the resolution of the Governing Body. At the same time, however, it refers to the cause for termination being unsatisfactory performance. The resolution dated 15-3-1991, as already seen above, also refers to unsatisfactory performance being the cause for

termination of the services. The Tribunal while dealing with this aspect, however, has observed that the termination order is dated 14-3-91 and the Governing Council considered the report of the Principal in the meeting dated 15th March 1991 and applied its mind to the report on the day following the day of order of termination.

15. As already observed above, Statute 418(2) clearly provides that the decision regarding confirmation or termination of services of a probationer has necessarily to be by the Governing Body. In other words, the Statute governing the service conditions of the probationer nowhere empowers either the Principal or the Chairman of the Governing Body or both of them taken together to decide about the termination of services of a probationer. Such a decision has necessarily to be of a Governing Body. Being so, merely on issuance of an order either by the Principal or the Chairman of a Governing Body purporting to terminate the services of a probationer, it cannot have legal sanctity nor it would be enforceable in law. Viewed from this angle, therefore, any order issued by the Principal or the Chairman of the Governing Body or either individually or both of them together terminating the services of a probationer cannot result in termination of services of such a probationer. Applying the same to the letter of

14-3-1991, if construed as a decision of the Principal and the Chairman of the Governing Body, it cannot have the effect of termination of services of the respondent. But that is not the end of the matter.

16. It is not in dispute that the Governing Body, in fact, resolved on 15-3-1991 to terminate the services of the respondent on account of unsatisfactory performance. In other words, a competent authority under the Statute arrived at a lawful decision regarding the termination of services of the respondent. It is also not in dispute that the factum of termination of services on account of unsatisfactory performance was communicated to the respondent under the letter dated 14-3-1991 on 19-3-1991. Obviously the communication was after the decision of the Governing Body, the competent authority to decide the matter in issue. It is not in dispute that the communication of decision of termination of services can be either by the Principal or the Chairman of the Governing Body. There is no insistence that such communication should be signed by all the members of the Governing Body. In the back ground of these facts, merely because the letter of communication was dated 14-3-1991, which was, in fact, communicated after the decision of the Governing Body, can it be said that same was the decision only of the Principal and the Chairman of the Governing Body? Apart from the letter dated

14-3-1991 itself, no other material is placed on record to arrive at the conclusion that the decision communicated was merely of the Principal and the Chairman of the Governing Body. As against this, the records undoubtedly disclose the decision of the Governing Body dated 15-3-1991 to the effect that the services of the respondent were to be terminated on account of unsatisfactory performance. The Tribunal, in the impugned order, has referred to a decision of the Apex Court in the **State of Punjab v. Amar Singh Harika,** reported in Vol.III S.C. Services Law Judgments 503. In the said decision, the Apex Court had held that the order of dismissal passed by an appropriate authority cannot be said to take effect unless the officer concerned is communicated with the said order and that the order can take effect only after communication to the officer concerned or is otherwise published. It is not the case in the matter in hand that the order dated 14-3-1991 was brought to the notice of the respondent by way of publication. It is undoubtedly communicated on 19-3-1991 after the resolution by the Governing Body. The Tribunal has ignored the said decision of the Apex Court merely by observing that it does not advance the case of the petitioner herein. Indeed, the law on this point is well-settled. An order of termination by no stretch of imagination can be said to take effect prior to communication thereof to the officer concerned or by

publication thereof. It is nobody's case that the letter dated 14-3-1991 was published on 14-3-1991 or any time prior to 19-3-1991 i.e. prior to communication thereof to the respondent. In this view of the matter, therefore, I do not find any fault with the said letter merely because it is dated prior to the resolution of 15-3-1991. It is true that no explanation was sought to be given in relation to as to why the letter was dated 14-3-1991 when the resolution was of 15-3-1991, except that the order of termination would take effect from the date of communication in view of the said decision of the **Apex Court.** But at the same time it is also to be noted that in the memo of the appeal filed by the respondent before the Tribunal, she did not raise any controversy as regards such discrepancy. The only dispute which was sought to be raised was that there was no decision by the management i.e. by the Governing Body and the decision to terminate the services was allegedly by the Chairman and the Principal. Once the facts in that regard were made clear by producing the necessary resolution of the Governing Body dated 15-3-1991, no credence can be given to the said discrepancy, more particularly in view of the fact that the letter refers to the same cause for termination of the services as was the subject-matter of the resolution passed by the Governing Body.

17. The fall out of the above discussion is that the Tribunal did ignore the materials on record and also did not take into consideration the relevant materials before arriving at the findings which have been arrived at by the Tribunal. The learned Advocate for the petitioners is justified in contending that the Tribunal totally misconstrued the Appendix D-1 as being a self-assessment report, when in fact it apparently discloses that it relates to the assessment of performance of the respondent by the Principal. The records regarding the resolution of the Governing Body apparently disclose that the Principal had placed before such Body the necessary report and the relevant materials and the Governing Body after considering the report regarding the unsatisfactory performance on the part of the respondent, decided to terminate her services during her probationary period. The said resolution of the Governing Body to terminate the services was intimated to the respondent on 19-3-1991, much after the said resolution. The decision being in consonance with the Statute No.418(2) by which the service conditions of the respondent were governed, the Tribunal could not have found fault with the said decision and, therefore, there is a clear case made out for interference in the impugned order and to set aside the same.

18. Indeed, the learned Advocate for the respondent sought to contend that this Court in exercise of powers under Article 227 should be reluctant to interfere in the order in view of the fact that social justice is sought to be met with by the impugned order. An order which has been passed contrary to the provisions of law and totally forgetting the manner in which the jurisdiction is to be exercised by the Tribunal while dealing with appeal against the order of termination of services can hardly be said to meet the ends of social justice. Social justice has to be in accordance with the provisions of law and without ignoring the statutory provisions applicable to the parties and without flouting the service conditions by which the parties are governed.

19. In the facts and circumstances of the case, therefore, and for the reasons recorded above, the impugned order cannot be sustained and is liable to be set aside. Therefore, the petition succeeds; the impugned order is hereby quashed and set aside and the rule is made absolute in terms of the prayer clause (b) with no order as to costs.

(R.M.S. Khandeparkar, J.)

sjs/117wpj1722.93